LIM LEAN HENG

v.

WAKO MERCHANT BANK (SINGAPORE) LTD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ARIFIN JAKA JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NOS: W-02-439-2000,
W-02-461-2000 & W-02-462-2000]
11 FEBRUARY 2004

CIVIL PROCEDURE: *Injunction - Mareva injunction, application post judgment - Evidence in support thereof - Question of illegality - Whether irrelevant to application*

EVIDENCE: *Relevancy - Illegally obtained evidence - Evidence in support of application for post judgment mareva injunction - Whether question of illegality irrelevant to application - Equitable principle of "unclean hands" - Whether inapplicable in circumstances of case*

These were the appellants' appeals against the refusal of the High Court judge to allow them to cross-examine two deponents on their affidavits so as to defeat the respondent's application for a post-judgment mareva injunction. The appellants alleged that the evidence given by the two deponents, one a private investigator and the other a banker, in support of the injunction was obtained by illegal means. It was alleged that the deponents had disclosed all the appellants' accounts in breach of confidentiality and revealing information that was strictly the appellants' property. The High Court judge held that the principle of unclean hands did not prevail in the circumstances of this case.

Held (dismissing the appeals)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Equity imposes an obligation on the recipient of confidential information not to disclose it. A threat to do so will be restrained by injunction. A breach of confidentiality is remedial in damages. But such a breach cannot found an application for cross-examination. It stumbles at the very first step of relevancy. For it can hardly be relevant in an application for a post-judgment mareva injunction prayed in aid of execution that illegally obtained evidence is sought to be admitted. If there was a complaint that confidence was breached, the appellants had appropriate remedies available to them. However, cross-examination was not one of those remedies. (p 12 b-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keengganan hakim Mahkamah Tinggi membenarkan mereka menyoal balas dua orang deponen berkaitan afidavit-afidavit mereka dengan tujuan untuk membatalkan permohonan responden untuk mendapatkan injunksi mareva di peringkat pasca penghakiman. Perayu mengatakan bahawa keterangan sepertimana yang diberikan oleh deponen-deponen, yang pertama seorang penyiasat persendirian dan yang kedua seorang banker, bagi menyokong injunksi telah diperolehi dengan cara yang tidak sah. Ianya dihujahkan bahawa deponen-deponen telah mendedahkan segala akaun perayu secara yang memungkiri kerahsian dan mendedahkan maklumat-maklumat yang merupakan harta-harta perayu. Hakim Mahkamah Tinggi memutuskan bahawa prinsip tangan yang kotor tidak terpakai kepada halkeadaan kes semasa.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Ekuiti meletakkan obligasi ke atas penerima maklumat rahsia untuk tidak mendedahkannya. Sebarang ancaman untuk berbuat demikian harus dihalang oleh injunksi. Sesuatu kemungkiran kerahsian membangkitkan remedi gantirugi. Tetapi kemungkiran sedemikian tidak boleh mengasaskan suatu permohonan untuk menyoal balas. Ia tersungkur pada tangga pertama kerelevanan. Ia tidak relevan dalam permohonan untuk injunksi mareva peringkat pasca penghakiman yang dipohon bagi menyokong suatu pelaksanaan kerana keterangan yang diperolehi secara tidak sah telah dipohon untuk diterima masuk. Jika terdapat bantahan bahawa kerahsian telah dimungkiri, perayu mempunyai remedi-remedi yang sewajarnya. Bagaimanapun, penyoalan balas bukan salah satu dari remedi tersebut.

Case(s) referred to:
Bell Cablemedia Plc v. Simmons [2002] FSR 34 ***(foll)***
Douglas & Ors v. Hello Ltd [2001] 2 All ER 289 ***(refd)***
Maju Holdings Sdn Bhd v. Kamala Devi [2003] 1 CLJ 434 CA ***(dist)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 97
Evidence Act 1950, s. 162

(Civil Appeal No: W-02-439-2000)
For the appellant - Conrad Young; M/s Sivananthan
For the respondent - Trevor George De Silva; M/s Lee Ong & Kandiah

(Civil Appeal No: W-02-461-2000)
For the appellant - Ranjit Singh; M/s Ranjit Ooi & Robert Low
For the respondent - Trevor George De Silva; M/s Lee Ong & Kandiah

(Civil Appeal No: W-02-462-2000)
For the appellant - S Suhendran; M/s Kadir, Andri Aidham & Partners
For the respondent - Trevor George De Silva; M/s Lee Ong & Kandiah

Reported by Usha Thiagarajah

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

There are three appeals before us this morning. They are Civil Appeal Nos. W-02-439-00, W-02-461-00 and W-02-462-00. They all arise from the same suit. They have to do with the decision of the learned judge in the court below refusing applications by all the appellants to cross-examine two deponents on their affidavits.

The substantive application before the High Court was for a post-judgment Mareva injunction. Judgment had already been obtained against the appellant in Civil Appeal No. W-02-439-00 in Singapore. That judgment was brought into our jurisdiction and registered in our High Court on 21 September 1998. The bare bones of the case is that the appellant in Civil Appeal No. W-02-461-00 (the wife of the appellant in W-02-439-00) and the appellants in W-02-462-00 (both limited companies) are the alter ego of the appellant in W-02-439-00. It was in the course of an application for a Mareva injunction made in that context that the appellants made their applications to cross-examine.

It is settled law that whether cross-examination of a deponent on an affidavit ought to be granted or refused is a matter within the discretion of the court to whom the application is made. So long as that court takes into account relevant considerations and does not take into account irrelevant considerations and asks itself the right questions, this court will not interfere. We have said often enough that our role as an appellate court in a matter such as this, involving discretion, is one of review only. It is only after an appellant has succeeded in establishing that the discretion-court has gone wrong in one of the ways we have just described that this court becomes entitled to exercise a discretion of its own. It is with these principles in mind that we address these appeals.

The main complaint made against the learned judge is that he held that the principle of "unclean hands" did not apply to a post-judgment Mareva injunction where evidence in support of the injunction had been obtained by illegal means. In order to appreciate this argument, it is necessary to hearken to some of the factual matters.

The substance of the complaint here is that the deponents to two affidavits, one a private investigator and the other a banker, had disclosed the accounts of all the appellants. It was on that basis that it was sought to cross-examine these deponents.

We must be forgiven if we confess our inability to appreciate the complaint made. This is a case where the appellants are saying that these two deponents had breached confidence and revealed information which was strictly the appellants' property. Without going into any detail, suffice if we say that equity imposes an obligation on the recipient of confidential information not to disclose it. A threat to do so will be restrained by injunction. A breach of confidentiality is remediable in damages. See *Douglas & Ors v. Hello Ltd* [2001] 2 All ER 289.

But such a breach cannot in our view found an application for cross-examination. It stumbles at the very first step of relevancy. For it can hardly be relevant in an application for a post-judgment Mareva injunction prayed in aid of execution that illegally obtained evidence is sought to be admitted. If there is a complaint that confidence was breached, the appellants have appropriate remedies available to them. However, cross-examination is not one of those remedies.

Although these are fairly straight forward principles for which no authority is really necessary, we would in support of what we have said cite the following passage in the judgment of Millett LJ in *Bell Cablemedia Plc v. Simmons* [2002] FSR 34:

> Unable to rely upon privilege or confidentiality, the defendant has sought to invoke the ancient jurisdiction of a court of equity to relieve against the consequences of mistake and accident. The attempt is in my opinion misconceived. The common law has always set its face against preventing a party to civil proceedings from adducing admissible evidence even where it has been improperly obtained: *Calcraft v. Guest* [1898] 1 QB 759. Equity has never sought to intervene in this context. It has never sought to mitigate the rule in *Calcraft v. Guest*, but on the contrary has applied it to proceedings in its own courts. It is significant that in *Ashburton v. Pape* the equitable jurisdiction was firmly based on confidence and not upon any wider principle of fair play in litigation. But in any case the defendant's mistake, as I have already pointed out, is not the kind of mistake in respect of which a court of equity would ever grant relief. It will not protect a dishonest man from the consequences of mistakenly disclosing evidence of his dishonesty.
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> In my judgment the public interest which is served by the privilege against self-incrimination is fully satisfied by a rule which merely prevents a party from being compelled to incriminate himself. There is in my view no public interest in preventing a party to civil proceedings from taking advantage of an inadvertent disclosure, without any breach of duty, of highly relevant information which supports his case merely on the ground that it also tends to incriminate his opponent.

Turning to the present appeals, we have read the judgment of the learned judge but are unable to find any appealable error. In fairness to his Lordship, we must say that he did not go as far as suggested by learned counsel for the appellants in Civil Appeal No. W-02-462-00 (whose arguments were adopted in toto by counsel in the other appeals). Indeed there is a passage in the judgment which shows that the learned judge addressed the very issue that was put to him, applied the correct law and came to the correct conclusion. This is what he said:

> A Mareva injunction being an equitable relief, the maxim about clean hands must apply to the applicant for the injunction. The problem in this case is to decide whether the circumstances that I have set out merit the application of the principle. The passages relied on by the plaintiffs clearly show that there are limitations to the maxim. Unfortunately they are of no help in determining whether the circumstances in this case call for the application or limitation of the maxim.
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> I think there can be no hard and fast rules. Equitable principles, by their very nature of being based on conscience, cannot be rigid in their application. In the end one must be guided by conscience and a sense of fairness.
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> The plaintiffs have come to court for a Mareva injunction with evidence that is admissible in law of the existence and particulars of the bank accounts and that is true, notwithstanding that it may be an offence against section 97 to have obtained or disclosed it and notwithstanding that those sections are aimed at protecting the secrecy of those accounts. I think it would be unconscionable to bar the plaintiffs from the relief sought on the ground of any wrongdoing in the obtaining of the evidence. The facts and truth about those accounts were there, and it was only a matter of uncovering the truth. It would be unconscionable to allow the defendants to defeat the plaintiffs' application on the ground that they had obtained the truth by – assuming such to be the case – foul means. Truth is supreme and must prevail. I rule that the principle of clean hands does not prevail in the circumstances of this case. The principle is irrelevant and the defendants cannot be given leave to cross-examine the private investigator and the managing director for the purpose of showing that the plaintiffs have not come to court with clean hands.

There is one other point that we need to address. It is Mr. Suhendran's submission that the judgment of the learned judge runs foul of the judgment of this court in *Maju Holdings Sdn Bhd v. Kamala Devi* [2003] 1 CLJ 434. learned counsel drew our attention to two passages in the judgment of our learned brother, Alauddin bin Dato' Mohd Sheriff JCA. In the course of delivering judgment of this court in that case, his Lordship made the following observations:

Now, coming back to the present appeal before us and in answer to the appellant's grounds of appeal we would say this. If the appellant merely requires the first respondent to testify on what appears on the face of the said documents, then the first respondent may do so without breaching the secrecy provision of s. 97(1) of BAFIA. But this is not the case here. Here, the appellant, as stated at p 162 of the appeal record, wanted to examine the first respondent as to who the beneficial owner of 1,646,000 shares in Ipmuda Bhd is and not merely what appears on the face of the Forms 29. They wanted the first respondent to testify on matters beyond what appears on the face of the documents.

This, in our view, would clearly be in breach of s. 97(1) of BAFIA. The appellant's contention is that s. 97(2) permits such evidence to be given. With due respect to the appellant, we must say that their contention is totally misconceived because the testimony so required of the first respondent goes far beyond what appears on the face of the documents, ie Form 29, in that such testimony would enable information relating to a particular customer of the bank to be ascertained from it. Certainly, both s. 97(1) and (2) of BAFIA prohibit this. Section 97(2) only opens the way for the admission of Forms 29 under the writ of *subpoena duces tecum.*

Further, we find that the other exceptions to s. 97(1) of BAFIA, namely ss 98 and 99 are also not applicable on the facts of the present appeal. In the circumstances, the first respondent is absolutely prohibited from giving oral testimony on matters relating to the accounts of a customer of the bank. We may add that such being the situation, the learned judge does not have any discretionary power to allow disclosure of information if such information is prohibited under s. 97(1) BAFIA. In the absence of such discretionary power on the part of the learned judge, it would be wrong for the appellant to suggest that s. 97(1) of BAFIA affords a privilege to information and documents as mentioned in their grounds of appeal.

Next, it is the appellant's contention that the learned judge had failed to consider or sufficiently consider the various factors mentioned in paras 2.1-2.5 of their grounds of appeal. In our judgment, such failure on the part of the learned judge would not have in any way affected his decision for the following reasons:

(1) notwithstanding the relevancy of the evidence sought to be produced through the first respondent, this must necessarily be subjected to any statutory prohibition as to its admissibility;

(2) further, the first respondent is not the maker of the documents sought to be produced. The various Forms 29 are prepared by the global securities services department of the bank based on the computer records of the bank. As such, the first respondent is not in a position to give any evidence and/or relevant evidence pertaining to such documents and is therefore not in a position to inform the court who the true beneficial owner of 1,646,000 shares in Ipmuda Bhd is if it was other than the

person mentioned in the Forms 29. Thus, the evidence sought to be adduced through the first respondent is not the best evidence (see *Tan Siew Sin v. Hasnul bin Abdul Hadi; Re application of Tun (Dr) Ismail & Anor* [1967] 2 MLJ 191; *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 2 MLJ 627 and *Chow Siew Woh v. Public Prosecutor* [1967] 1 MLJ 228);

Learned counsel submits that the effect of this passage is that while it is the common law rule that illegally obtained evidence is admissible, statute may make an in-road into and limit that principle. In other words, s. 97 of the Banking and Financial Institutions Act 1989 ("BAFIA") had created a statutory exception to the common law principle.

We must be forgiven again if we enter our strong dissent to that submission. We have read the passages in the judgment in *Maju Holdings* and in our view the passage reproduced above is self-explanatory.

Maju Holdings Sdn Bhd was a case in which a subpoena duces tecum pursuant to s. 162 of the Evidence Act 1950 had been sought to obtain information protected by the BAFIA. It is in that very limited context that the observations of his Lordship were made. We accordingly reject the submission that those passages are to be interpreted as supporting the wider proposition contended for before us this morning.

Drawing the threads together, we come to the conclusion that this is a case, rather simple, but made complex by the ingenuity of counsel. The point about the "unclean hands" principle was raised by the appellants. They invited the learned judge to go into it. They asked for a ruling about it. It was done at a very preliminary stage of the hearing. The merits of the post-judgment Mareva injunction application were yet to be heard. It would have been most appropriate that these points be raised at that stage. Having attempted a pre-emptive ruling, it hardly lies in the mouth of the appellants to now complain about the very finding which they invited from the court. Their fear that the observations made by the learned judge would have an effect on the outcome of the substantive application is of course unfounded. Different considerations would no doubt manifest themselves when all the arguments have been put before the court that will hear this application.

For these reasons, these appeals fail. They are dismissed. The appellants must pay the costs of the respondent. However since arguments in all three appeals were the same and only one counsel addressed us, we think this is an appropriate case to order a single bill of costs on a single taxation before the registrar at both levels.